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## *Separate Property and Family Self-Determination in Catalonia: A Peaceful Model under a Change?*

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### *Abstract*

*This working paper evaluates and analyses the available data about marital contracts in Catalonia and Spain during the 20<sup>th</sup> Century and relates them to family property statistics. From a positive standpoint, the article suggests a family self-determination model structurally linked to the marital property regime. The second part of the working paper addresses a normative approach to the conclusion of marital contracts and puts forward some hypotheses intended to explain its 600 % exponential increase in Catalonia in the last three years.*

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## 1. Introduction

The starting point of this paper is the 600% exponential increase of the marital contracts celebrated in Catalonia in the last three years.

This important change in the self-determination action within the family context presents the attractive challenge of explaining its causes.

Hence, the major goal of this paper is to present several hypotheses that might explain this tendency in the marital contracts context. However, in order to reach a consistent conclusion we consider necessary to study and to analyze beforehand the incentives and motivations of Catalans when celebrating marital contracts during the last 20<sup>th</sup> century.

This paper is framed in the Spanish legislative context. However Spain is a plurilegislative state in which separate property is implemented in regions such as Catalonia while community property is the predominant regime in most of the Spanish autonomous regions. Therefore, both marital property regimes coexist in Spain and they have an important influence on parties who are considering whether to celebrate a marital contract or not. For this reason it has been necessary to collect all the available data about the conclusion of marital contracts both in Catalonia and in the rest of Spain during the 20<sup>th</sup> century.

The contrast between the Catalan and the Spanish marital property regime and their different reality in terms of individuals' incentives to celebrate marital contracts allows us to derive a self-determination model according to which individuals' self-determination decisions would be directly related to the underlying marital property regime.

Thus, we consider that depending on which is the marital property default regime – either separate property or community property – spouses' self-determination will be wider or narrower. For example, in Catalonia, we argue that separate property implies self-determination as a structural element of the legal regime whereas self-determination under the Spanish community property default regime implies an opting-out option of the default legal regime and its substitution for another regime choiced by the spouses.

## 2. Marital Contracts and Family Self-determination in the 20<sup>th</sup> Century: Eight Decades of Catalan and Spanish Experience

Marital contracts or marital agreements are legal instruments that allow individuals to regulate the economic consequences derived from the marriage contract<sup>1</sup>. For this reason, spouses

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<sup>1</sup> For a general overview of marital contracts in Catalan Law, see Lluís PUIG I FERRIOL / Encarna ROCA I TRIAS, *Institucions del Dret Civil de Catalunya. Vol. II. Dret de la Persona i Dret de Família*, 5.<sup>a</sup> ed., València, Tirant lo Blanch, 1998, 321. For the Spanish civil law, see, lately, Víctor M. GARRIDO DE PALMA, "La economía de la familia. Las capitulaciones matrimoniales y el régimen económico matrimonial", in Juan Francisco DELGADO DE MIGUEL

incentives to celebrate marital contracts will be influenced by their wealth and the default marital property regime they are subject to.

Thus, if, for example, spouses have a substantial wealth, they will feel the need to agree upon its management and its inheritance distribution. At the same time, spouses will feel the need to self-regulate their economic interests if the existing marital property default regime did not strongly regulate the economic consequences of marriage.

However, marital contracts are not the only legal instrument that allows self-regulation of spouses' economic interests regarding their private wealth. Marital contracts are not even the general self-regulation instrument mostly used in practice. Nonetheless, the celebration of marital contracts has substantially increased these last years in Catalonia.

The main goal of this paper is to analyze the underlying reasons that might explain the sudden increase in the amount of marital contracts celebrated in Catalonia. However, it will be first necessary to study the evolution of the marital contracts celebrated during the 20<sup>th</sup> century in Spain.

Spain is a plurilegislative state in civil law matters where different marital property regimes coexist. Thus, while in Catalonia and in the Balearic Islands separate property is the default rule, in the other territories of Spain - including the civil law regimes in Aragon, Galicia, Navarre and the Basque Country - community property is the default rule.

The data on which this paper is based come from the *Anuario de la Dirección General de los Registros y del Notariado* from the Spanish Justice Department. The data series that has been used start in the year 1921 until the year 2001. Therefore, the analysis will be based on 81 years' data<sup>2</sup>. The other data used are from the Catalan Statistical Institute ([www.idescat.es](http://www.idescat.es)) and from the Spanish National Institute of Statistics ([www.ine.es](http://www.ine.es)).

However, even though we did not have access to the complete set of data regarding family self-determination practice, we believe that it is possible to derive some consequences of the analysis of the available data.

If we observe in absolute terms the first and the last published data reporting the amount of marital contracts celebrated in Catalonia, it would seem that there has not been much change

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(coord.), *Instituciones de Derecho Privado. Tomo IV. Familia. Vol. 1*, Madrid, Civitas, 2001, 199; María del Carmen BAYOD LÓPEZ, *La modificación de las capitulaciones matrimoniales*, Zaragoza, Prensas Universitarias de Zaragoza, 1997.

<sup>2</sup> However, there are a few years in which there were no data available. Between the years 1936 until 1939 there are substantial variations in the data due to the Spanish civil war. Additionally, there were not data are only available data for Catalonia for the year 2002.

during the last 81 years: in 1921 there were 2.696 marital contracts celebrated and in 2001 spouses concluded 2.648 contracts<sup>3</sup>.

However, we observe that the evolution of self-determination through the celebration of marital contracts during the 20<sup>th</sup> century is clearly negative and, in Catalonia, it becomes residual since the year 1960.

MARITAL CONTRACTS IN CATALONIA																	
1921	2696	1930	2139	1939	633	1948	1511	1957	1100	1966	692	1975	430	1984	445	1993	679
1922	2330	1931	1948	1940	1333	1949	1408	1958	1110	1967	612	1976	482	1985	551	1994	603
1923	2250	1932	1706	1941	1504	1950	1371	1959	1009	1968	560	1977	462	1986	490	1995	607
1924	1991	1933	1749	1942	1562	1951	1394	1960	919	1969	451	1978	552	1987	488	1996	605
1925	1990	1934	1557	1943	1405	1952	1340	1961	837	1970	412	1979	600	1988	446	1997	648
1926	2023	1935	1.628	1944	1491	1953	1239	1962	814	1971	396	1980	593	1989	460	1998	546
1927	2088	1936	767	1945	1551	1954	1225	1963	767	1972	426	1981	589	1990	341	1999	599
1928	2182	1937	86	1946	1488	1955	1152	1964	683	1973	412	1982	545	1991	359	2000	2197
1929	2012	1938	71	1947	1564	1956	1157	1965	655	1974	384	1983	448	1992	654	2001	2648

In 1931, ten years after the beginning of the collection of notarial data, the amount of marital contracts celebrated was lower than 2000 per year. Since 1960, when the Catalan Civil Law Compilation was passed, not even 1000 marital contracts per year were celebrated. During this period, 1990 is a remarkable year because only 341 marital contracts were celebrated, the lowest amount of the 20<sup>th</sup> century. This negative tendency had a sudden change in the year 2000 when there were 2.197 marital contracts concluded. This corresponds to 367% increment with respect to 1999; when only 599 marital agreements were celebrated.

Comparing the evolution of the Catalan and the Spanish data it is noticeable that their evolution has been quite different.

During these last eight decades, in Spain there were 6.535 marital contracts celebrated in the year 1921 whereas in the year 2001 there were 64.136 marital contracts. This astonishing increment in absolute terms represents a 981,4% growth in 80 years.

However, this important variation only takes place since the year 1975 because until then self-determination through marital contracts was diminishing in Spain, as it was in Catalonia. For example, in the year 1969 only 1.137 marital contracts were celebrated in Spain.

<sup>3</sup> Until 1979 has taken also into account this data, Josep M. PUIG SALELLAS, *Les relacions econòmiques entre esposos en la societat catalana d'avui*, Acadèmia de Jurisprudència i Legislació de Catalunya, Barcelona, 1981.

MARITAL CONTRACTS IN SPAIN																	
1921	6535	1930	4930	1939	1814	1948	3274	1957	2390	1966	1433	1975	2217	1984	18339	1993	31588
1922	6070	1931	4618	1940	3533	1949	3168	1958	2269	1967	1285	1976	3970	1985	22301	1994	34639
1923	5545	1932	4276	1941	3623	1950	2996	1959	2043	1968	1313	1977	5546	1986	19540	1995	37545
1924	5395	1933	4201	1942	3691	1951	2986	1960	2044	1969	1137	1978	7296	1987	21905	1996	38535
1925	4720	1934	3898	1943	3433	1952	2994	1961	1889	1970	1174	1979	9001	1988	22555	1997	41484
1926	5031	1935	3393	1944	3751	1953	2804	1962	1700	1971	1169	1980	11695	1989	23521	1998	45430
1927	5107	1936	1936	1945	3511	1954	2708	1963	1616	1972	1287	1981	13929	1990	24432	1999	49773
1928	5196	1937	479	1946	3295	1955	2666	1964	1426	1973	1294	1982	15121	1991	25636	2000	54208
1929	4761	1938	508	1947	3477	1956	2544	1965	1340	1974	1386	1983	17365	1992	28939	2001	64136

It is necessary to remark that during the eighty years period object of our analysis, the Spanish population has almost doubled while the Catalan has almost tripled.

POPULATION IN CATALONIA				POPULATION IN SPAIN			
1920	2.355.908	1970	5.107.606	1920	22.012.663	1970	34.041.535
1930	2.731.627	1981	5.956.414	1930	24.026.571	1981	37.682.355
1940	2.915.757	1991	6.059.494	1940	26.386.854	1991	38.872.268
1950	3.218.596	2001	6.361.365	1950	28.172.268	2001	41.116.842
1960	3.888.485	2002	6.506.440	1960	30.776.935	2002	41.837.894

Concerning the number of marriages, out of the data available since 1946, there have been substantial variations. Even though the annual amount of marriages has been approximately 200.000 in Spain, there has been an increasing tendency that reached its maximum point in the year 1975, when 271.347 marriages were celebrated. At the same time, in Catalonia there has been a positive evolution with a minimum of 19.487 of marriages in the year 1943 and a maximum of 42.379 in the year 1973.

MARRIAGES IN CATALONIA				MARRIAGES IN SPAIN			
1946	25239	1975	41383	1946	203335	1975	271347
1950	25855	1980	28702	1950	209942	1980	220674
1955	29635	1985	30008	1955	236913	1985	199658
1960	30241	1990	32558	1960	236877	1990	220533
1965	30881	1995	31476	1965	228265	1995	200688
1970	37394	2001	31126	1970	248205	2001	208057

To further into the analysis it will be necessary to study the quantity of marital contracts celebrated with respect to the number of marriages. As a consequence we will obtain the marital contract rate per celebrated marriage.

Nevertheless, the former rates of marital contracts per marriage do not allow us to infer conclusions about the Catalan and the Spanish reality because we assume that marital contracts are mainly celebrated after the marriage. However, in the past, marital contracts were mostly celebrated before the marriage.

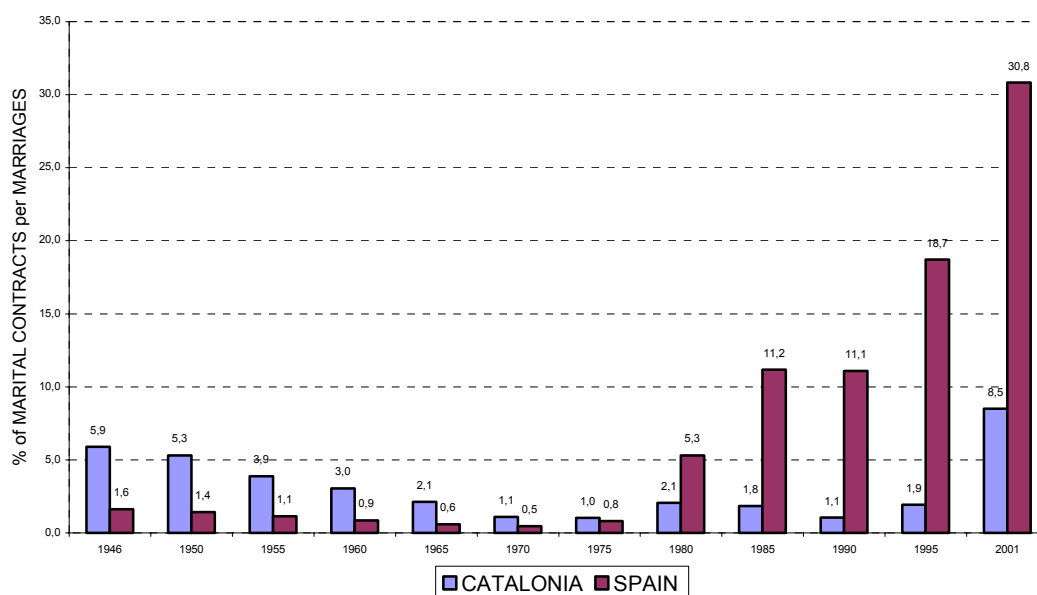
Despite the above mentioned we believe that the marital contract rate is a relevant and indicative variable that informs us of the weigh of the marital agreements in the society of nowadays.

CATALONIA											
YEARS	MARITAL CONTRACTS	MARRIAGES	%	YEARS	MARITAL CONTRACTS	MARRIAGES	%	YEARS	MARITAL CONTRACTS	MARRIAGES	%
1946	1488	25239	5,9	1970	412	37394	1,1	1995	607	31476	1,9
1950	1371	25855	5,3	1975	430	41383	1	1999	599	31497	1,9
1955	1152	29635	3,9	1980	593	28702	2,1	2000	2197	32477	6,8
1960	919	30241	3	1985	551	30008	1,8	2001	2648	31126	8,5
1965	655	30881	2,1	1990	341	32558	1,1	2002	3764	31053	12,1

SPAIN							
YEARS	MARITAL CONTRACTS	MARRIAGES	%	YEARS	MARITAL CONTRACTS	MARRIAGES	%
1946	3295	203335	1,6	1975	2217	271347	0,8
1950	2996	209942	1,4	1980	11695	220674	5,3
1955	2666	236913	1,1	1985	22301	199658	11,2
1960	2044	236877	0,9	1990	24432	220533	11,1
1965	1340	228265	0,6	1995	37545	200688	18,7
1970	1174	248205	0,5	2001	64136	208057	30,8

The marital contract per marriage rate allows us observe the importance of marital contracts in Catalonia during the first half of the 20<sup>th</sup> century and its marginality during the second half of the century.

Conversely, it is possible to conclude a total irrelevance of marital contracts in Spain until 1975 that is when marital contracts have had a crucial role as a tool through which self-determination within the family law context has been manifested.



Concluding, despite the territorial differences and the different marital property regimes implemented, once the complete set of data are taken into account, marital contracts have a great importance in the family marital property in Spain within the European context.

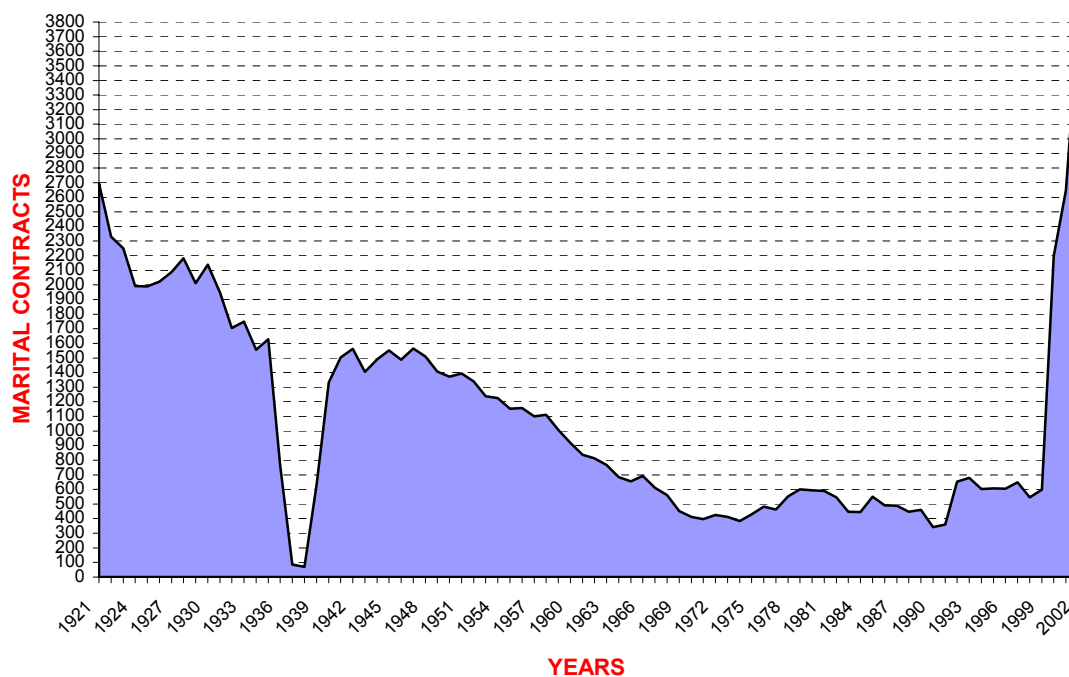
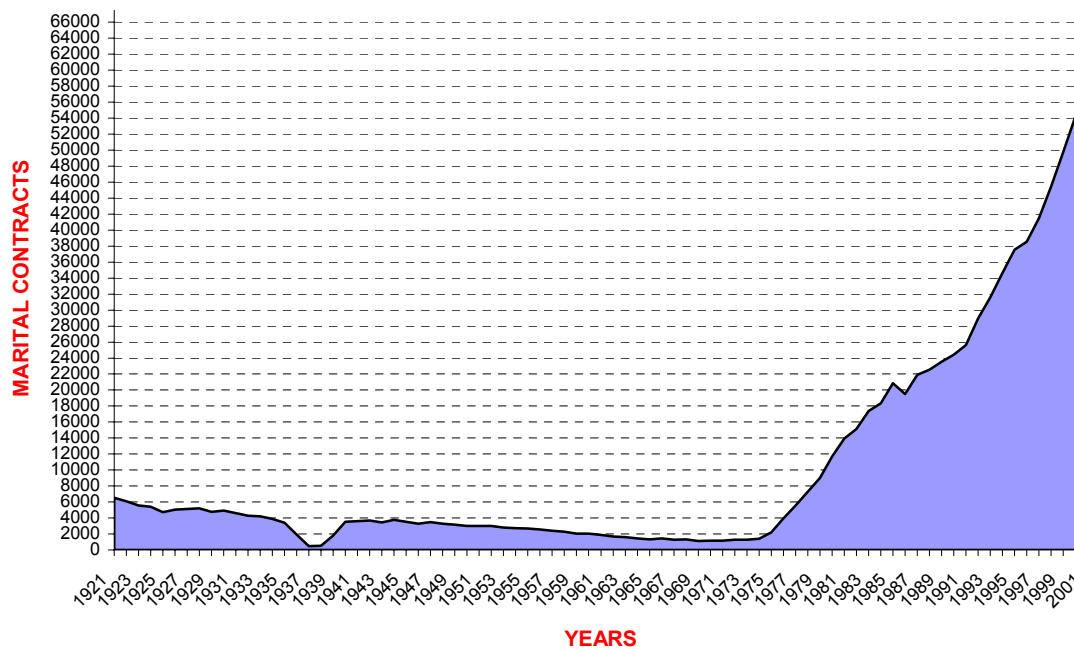
One of every three marriages celebrated a marital contract in Spain. Thus, in the year 2001 there were 208.057 marriages celebrated and 64.136 of those entered into a marital contract. This represents that 30.83% of the married couples decided to agree upon marital property. With respect to Catalonia, in the year 2002 there were 31.053 marriages and 3.764 marital contracts celebrated which represents 12.12% of the marriages. In other words, in Catalonia there is a marital agreement almost every ten married couples.

### *3. The Underlying Reasons of a Diverse Evolution: Separate and Community Property*

The available data show an exponential growth of the amount of marital contracts celebrated since 1975. However, before 1975, the tendency was clearly negative. This shift in the negative tendency along the 20<sup>th</sup> century in Spain has not taken place in Catalonia. The celebration of marital contracts in Catalonia has only increased substantially since the year 2000 when there has been a sudden change in the married couples' decision to enter into marital contracts. However, this rapid change is not consolidated yet and it will be necessary to observe how marital contracts evolve in the coming years.

The evolution of the celebration of marital contracts in Catalonia and in Spain is represented in the following diagrams.



EVOLUTION OF MARITAL CONTRATCS IN CATALONIAEVOLUTION OF MARITAL CONTRACTS IN SPAIN

Until the 70s, marital contracts in Catalonia were permanently decreasing. As we can observe there has been a declining tendency of the total amount of marital contracts celebrated in Spain until the first half of the 70s. This negative evolution might be influenced by the tendency in Catalonia because at that moment, marital contracts celebrated in Catalonia weighted 40% of the total contracts entered in Spain. In contrast, since mid 70s the Catalan negative growth had a lower influence in the Spanish evolution because in the years 1998 and 1999 Catalan marital contracts only represented the 1,2% of the total amount of contracts celebrated in Spain.

	CATALONIA	SPAIN	%
1921	2696	6535	41,25
1925	1990	4720	42,16
1930	2139	4930	43,39
1935	1628	3393	47,98
1940	1333	3533	37,73
1945	1551	3511	44,18
1950	1371	2996	45,76
1955	1152	2666	43,21
1960	919	2044	44,96
1965	655	1340	48,88
1970	412	1174	35,09
1975	430	2217	19,4
1980	593	11695	5,07
1985	551	22301	2,47
1990	341	24432	1,4
1995	607	37545	1,62
1999	599	49773	1,2
2000	2197	54208	4,05
2001	2648	64136	4,13

This dissimilarity in the practice in marital contracts between Catalonia and Spain is mainly due to the different marital property default regimes, as well as for the different social and economic traditions.

The legal framework in Catalonia and in Spain are structurally different. In Catalonia the marital property default regime is the separate property. In Contrast, the default regime in other territories of Spain is the community property regime.

This paper considers that marital separate property regime -which is the default regime in Catalonia- incentives the exercise of self-determination.

In contrast, community property regime implies a residual role for self-determination up to the point that exercising it leads to an opting-out of the regime. Therefore, in practical terms, the great majority of marital contracts celebrated under the community property rule want to switch the marital property regime. Therefore, self-determination in community property territories in practice implies the adoption of the separate property regime.

The Spanish plurilegislative reality offers an interesting frame to contrast and compare the diverse models and its different consequences.



The separate property default regime in Catalonia has been sometimes named as a non-marital property regime<sup>4</sup>. The absence of default regulation in marital property –understood as the absence of a community property regulation– implies a limited regulatory intervention that has forced spouses to enter into marital contracts in order to self-regulate their economic interests within the marriage.

Marital contracts have been a crucial factor of the agriculturally-based Catalan economy for managing, allocating and transferring the wealth of the family. Its quantitative importance in the first half of the 20<sup>th</sup> century supports this idea<sup>5</sup>.

Consequently, when the Catalan economy has diversified and become less agriculture-based, the importance of marital contracts diminished. However, this does not imply that Catalans do not self-regulate their economic interests within the marriage, even the contrary. Catalan spouses have kept on exercising self-determination besides the traditional models of management and transmission of wealth predominant and generally implemented in the rural society.

<sup>4</sup> See, Jesús DELGADO ECHEVERRÍA, *El régimen matrimonial de separación de bienes en Cataluña*, Madrid, Tecnos, 1974.

<sup>5</sup> For an exposition of the traditional model, see PUIG SALELLAS, *Les relacions econòmiques entre esposos en la societat catalana d'avui*, cit.; Juan José LÓPEZ BURNIOL, *La «resurrecció» dels capítols matrimonials (L'àmbit de l'autonomia de la voluntat en els contractes reguladors de la convivència)*, Acadèmia de Jurisprudència i Legislació de Catalunya, Barcelona, 1999. We assume that separate property regime has had, and still has, a component of gender discrimination and roles asymmetry in the economy organization of the family, but this is a question not considered in this paper.

Nowadays, the economy has a significant proportion of middle-class population who are enough wealthy to purchase real-state property. Given these circumstances, individuals' self-regulation of economic interests has taken place generally through the purchase of real-state property, the voluntary participation in the reciprocal revenues and the signature of wills.

On the other side, the community property default regime predominant in Spain – *sociedad de gananciales* – reduces substantially the scope of self-determination decisions. For example, until the year 1975, article 1315 of the Spanish Civil Code allowed only premarital contracts and prohibited (post)marital contracts. This change in the regulation in 1975 explains the exponential increase in the celebration of marital contracts until nowadays<sup>6</sup>.

However, it is important to remark that the significant number of marital contracts celebrated in Spanish Regions ruled under the Civil Code want to exit the community default regime and to agree upon a separate property regime as a strategy to split the family property in order to avoid potential creditor claims<sup>7</sup>.

	MARITAL CONTRACTS 2001		MARRIAGES 2001		% OF MARRIAGES CELEBRATING MARITAL CONTRACTS
	TOTAL	% ESPANYA	TOTAL	% ESPANYA	
ARAGÓN	2343	3,7	5920	2,8	39,6
ASTÚRIAS	1539	2,4	5102	2,5	30,2
ANDALUSIA	11605	18,1	42663	20,5	27,2
BALEARIC I.	304	0,47	4001	1,9	7,6
CANTÀBRIA	736	1,1	2913	1,4	25,3
CANÀRY I.	2983	4,7	6813	3,3	43,8
C. AND LEÓN	4551	7,1	12117	5,8	37,6
C. -LA MANCHA	2628	4,1	10077	4,8	26,1
CATALONIA	2648	4,1	31126	15	8,5
EXTREMADURA	1715	2,7	5696	2,7	30,1
GALÍCIA	7314	11,4	11828	5,7	61,8
MADRID	10498	16,4	25275	12,1	41,5
MÚRCIA	2174	3,4	6557	3,2	33,2
NAVARRRE	531	0,8	2724	1,3	19,5
BASQUE C.	2681	4,2	10041	4,8	26,7
LA RIOJA	427	0,7	1465	0,7	29,1
VALÈNCIA	9459	14,7	23033	11,1	41,1

<sup>6</sup> With the Act 14/1975, of May the 2<sup>nd</sup>, *sobre reforma de determinados artículos del Código civil y del Código de Comercio sobre la situación jurídica de la mujer casada y los derechos y deberes de los cónyuges postnuptial or marital agreements* were admitted. About this reform, see Vicente TORRALBA SORIANO, "Comentario al art. 1319", in A.A.V.V., *Comentarios a las reformas del Código civil. El nuevo Título Preliminar del Código civil y la Ley de 20 de mayo de 1975. Vol II*, Madrid, Tecnos, 1977, 1072; for an overview after several years of practice, Manuel AMORÓS GUARDIOLA, "Comentario a los arts. 1325 a 1335", in A.A.V.V., *Comentarios a las reformas del derecho de familia*, Madrid, Tecnos, 1984, 1515 y ss. Historically (post)marital contracts were allowed in Aragon and Navarre, although in the Basque Country must be only premarital or antenuptial.

<sup>7</sup> See José M. CUTILLAS TORNOS, *Las capitulaciones matrimoniales. Estudio de sus ineficacias y de sus acciones impugnatorias*, València, Revista General de Derecho, 2000.

#### 4. A New Century and a New Model of Marital Contracts in Catalonia

After having analyzed the evolution of marital contracts in Catalonia and in Spain, it is still necessary to explain the change in the evolution of the celebration of marital contracts at the beginning of the 21<sup>st</sup> century and the sudden and exponential 600% increase of the celebration of marital contracts in Catalonia in the last three years.

Even though separate property is still the default regime in Catalonia, the sudden change in the quantity of marital contracts celebrated in Catalonia is a consequence of recent modifications in the legal regime and transformations of the social and economical context<sup>8</sup>.

In this section we present several hypothesis that might explain the change in the tendency, assuming that a detailed empirical analysis of the content of the marital contracts should be also necessary.

##### 4.1. The Social Reaction to a New Regulatory Context

The marital property default regime in Catalonia –the separate property– has suffered two recent amendments: the Act 8/1993, of September 30<sup>th</sup>, *Modificació de la Compilació en matèria de relacions patrimonials entre cònjuges*<sup>9</sup>, and the Act 9/1998, of July 15<sup>th</sup>, of the Codi de Família<sup>10</sup>. It is reasonable to infer that these two legal amendments have been crucial in the decision of Catalan spouses of whether to celebrate marital contracts that has resulted in an exponential increase of this legal instrument, as happened with the above mentioned reform of the Spanish Civil Code in 1975.

One of the most important institutions brought in by these legal amendments is the introduction in the year 1993 of an economical compensation for reason of work. This compensation has similar grounds as the equitable distribution in the U.S. according to which when there is a crisis in the marriage, it is possible to allocate the value of wealth and properties of the spouses regardless who appears in the formal property title. This compensation is compatible with the awarding of alimony.

In Catalonia, this economic compensation has been modified in with the reform of the year 1998 in the articles 41 and 42 of the Family Code.

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<sup>8</sup> See Lluís FLAQUER (coord.), *Informe sobre la situació de la família a Catalunya. Un intent de diagnòstic. Any 2002*, Generalitat de Catalunya, Barcelona, 2002; Encarna ROCA, *Familia y cambio social (De la «casa» a la persona)*, Madrid, Civitas, 1999

<sup>9</sup> See Anna CASANOVAS I MUSSONS / Joan EGEA I FERNÁNDEZ / M.<sup>a</sup> del Carmen GETE-ALONSO CALERA / Antoni MIRAMBELL I ABANCÓ (coord.), *Comentari a la Modificació de la Compilació en matèria de relacions patrimonials entre cònjuges*, Barcelona, 1995.

<sup>10</sup> See Joan EGEA I FERNÁNDEZ / Josep FERRER I RIBA (dir.), Albert LAMARCA I MARQUÈS / Covadonga RUISÁNCHEZ CAPELASTEGUI (coord.), *Comentaris al Codi de Família, a la llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua*, Madrid, Tecnos, 2000.

**Article 41. Economic compensation on grounds of work**

1. In cases of judicial separation, divorce or marriage annulment, the spouse who has worked for the household or for the other spouse without receiving any retribution or who have received an insufficient retribution shall be entitled to receive an economic compensation from the other spouse, in the event this fact has produced a situation of inequality between the two patrimonies, which in turn implies an unfair enrichment.

Secondly, in the year 1998, the Catalan Family Code included in its article 15.1 the possibility that marital contracts could be used not only to organize the economy of the family but also for liquidate it. In other words, marital contracts can include provisions agreeing upon the consequences of a potential crisis in the marriage. By doing so, the regulation was implicitly acknowledging that the function of marital contracts is to construct a structure for the property of the family but also to deconstruct the family property as such and to distribute it among the members of the family<sup>11</sup>.

**Article 15. Contents**

1. In marital contracts, it is possible to determine the matrimonial economic system, agreements on inheritances, make donations and establish licit stipulations and pacts that are deemed convenient, even in anticipation of a marriage break-up.

Besides these two major regulatory reforms, Catalan law has recently introduced rules about spouses' several liability in front of third parties, contribution rights to the family expenses, and, especially, about protection of the family residence.

Considering these reforms as a whole, it is necessary to make some observations about them.

First, article 15 of the Catalan Family Code has increased the scope of the family self-determination because it includes the possibility that marital contracts can be used to anticipate the liquidation of the family property as such. At the same time, there has been a reduction of the scope of the self-determination. The legislator deemed necessary to intervene in the separate property regime with criterion of material justice and fairness by enhancing the protection of the weaker spouse within the marriage. At first glance these two reforms seem inconsistent: on one side self-determination is widened and on the other is reduced.

Second, the legislator has generated uncertainty in the major dynamics of the separate property regime and marital property structure of the marriage. The scope of self-determination in the marital contracts context has uncertain consequences because there are no explicit limitations on the "licit stipulations" even in "anticipation of a marriage break-up". Spouses may enter to a marital contract and in the case of a marital crisis, wait for the judicial pronouncement stating

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<sup>11</sup> About this reform and its possibilities in the practice, see Joan EGEA FERNÁNDEZ, "Pensión compensatoria y pactos en previsión de una ruptura matrimonial", in *Estudios Díez-Picazo*, 2003 (forthcoming).

whether a marital contract allows agreements between spouses excluding or limiting alimony or the compensation on grounds of work or, even, agreements upon the usage of the family residence. Another source of uncertainty is that article 15.1 of the Catalan Family Code is not consistent with the article 77 of the Catalan Family Code according to which only agreements that have been certified and authorized by a judge will be enforceable and executive.

Given the European law framework and the regulation on conflict of laws on marital property in a marriage context, it is not clear whether it is accepted in Catalonia an absolute separate property regime as it was in 1993 or not. At first sight it seems to be accepted, but on a closer analysis, it seems that it might be accepted only under certain circumstances of fairness. It is possible that the tendency of some of the marital contracts signed nowadays is the opposite of the one drawn by the legal reforms.

Concluding, the Catalan legislator has intervened in the separate property regime generating uncertainty with its regulatory decisions. This uncertainty in the regulation has given incentives to the spouses for self-designing a more certain marital property frame besides what has been established by the legislator. Paradoxically, marital contracts designed by the spouses in order to pursue certainty and celebrated according to what is established in the legal provisions may be void by the discretion of a judge.

#### 4.2. The Change of the Marital Property Regime

The statistics of the registration of the change of marital property regime of the Civil Register of the City of Barcelona supports the conclusion that marital contracts are the expression of self-determination within the separate property regime.

CHANGE OF MARITAL PROPERTY IN THE CIVIL REGISTER OF BARCELONA					
1998	1999	2000	2001	2002	January - March 2003
188	179	162	156	139	47

According to the article 17.2 of the Catalan Family Code, the modification of the marriage matrimonial property regime will only have effects in front of third parties if it has been inscribed in the Marriages' Civil Register.

Therefore, with the data, it seems clear that in Catalonia the new increasing on marital contracts implies only residually the modification of marital property regime. Generally, marital contracts will be used to change marital property only by spouses living in Catalonia but with community property as own regime.

The potential marital contracts of absolute separate property, excluding any distribution of property or alimony on divorce are not relevant in terms of entering to the Civil Register. This type of marital contracts is not enforceable in front of third parties because, like other possible agreements dealing with a future potential crisis in the marriage, they are only valid and relevant between spouses.

#### 4.3. Separation Agreements

As mentioned before, new marital contracts are strongly related to marriage crisis. However, the regulation of marriage crisis is generally *ex post* instead of being *ex ante*. Through marital contracts spouses formalize on an official document and in front of a public notary the liquidation of the family property as such before going in front of a judge or even without considering this possibility. The spouses, when they are going to separate or they are already separated, agree upon the distribution of the family's property and upon economic support in favor of one of the spouses or for the common children, its amount and frequency, the payment instrument and, even, its resignation. Concerning the non economical matters, they might agree upon issues concerning the children custody and their education<sup>12</sup>.

The increase of Alternative Dispute Resolution mechanisms has developed in the Act 1/2001, of March 15<sup>th</sup>, of *Mediació familiar de Catalunya*. The influence of this law is remarkable in the raise of separation agreements. However, all this new mechanisms have problems to develop because of the uncertainty and the inconsistency of the provision according to which these agreements between spouses need to be approved by a judge.

#### 4.4. Remarriage

A former marriage crisis and its subsequent judicial process incentives individuals' who are considering the possibility of getting married again, to avoid this negative, painful and long process. The high divorce rate in Spain and the growing tendency of divorced individuals' to get married again may be a crucial factor that would help us explain the substantial growth of marital contracts in Spain.

This would definitely be cases of planning and foreseeing *ex ante* the consequences of a potential crisis within the marriage.

First, the data of the divorces in Catalonia and in Spain reflect an increasing amount of divorces in the last years.

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<sup>12</sup> See LÓPEZ BURNIOL, *La «resurrecció» dels capítols matrimonials*, cit.

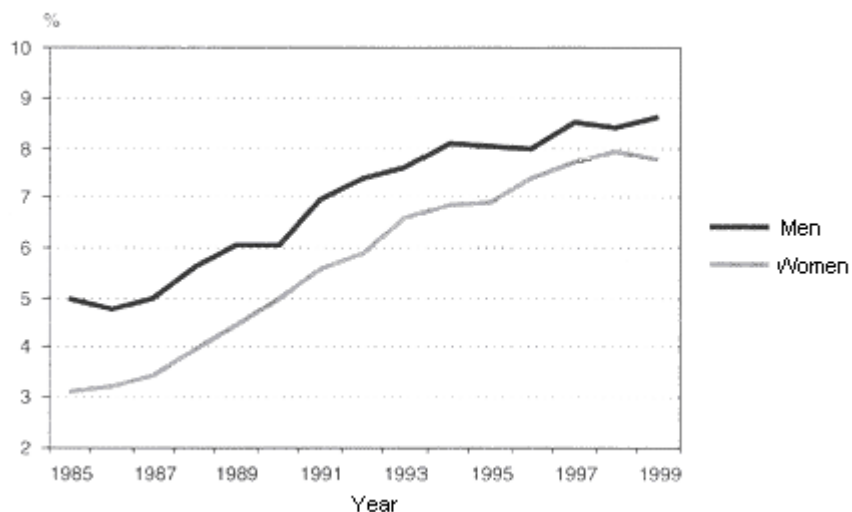


## DIVORCES 1991-2001

	CATALONIA	SPAIN	%
1991	-	27224	-
1992	-	26783	-
1993	-	28854	-
1994	-	31522	-
1995	-	33104	-
1996	-	32571	-
1997	7538	34147	22,1
1998	7886	36072	21,9
1999	7846	36101	21,7
2000	8348	37740	22,1
2001	7950	36155	22

Second, statistics reflect an increasing tendency of marriages in which one or two of the spouses have divorced from a previous marriage. In other words, spouses who have married more than once have increased in the last years.

This tendency is shown in the following diagram. This diagram reflects the increasing percentage of married couples with one of the spouses married more than one time with respect to the total amount of marriages every year. In the late 90s the percentage of marriages where one of the spouses had been previously married was almost 10% of the total amount of marriages.



(Source: Joaquim Capellades / Mireia Farré, "Evolució de la nupcialitat i la fecunditat" in Lluís Flaquer (coord.), *Informe sobre la situació de la família a Catalunya. Un intent de diagnòstic. Any 2002*, Generalitat de Catalunya, Barcelona, 2002, 30)

#### 4.5. Conflict of Laws: Mixed Marriages

Mixed marriages refer to marriages where spouses have different marital property default regimes resulting from their own national or personal law. The plurilegislative reality in Spain as well as the international context where Spain interacts raises choice of law issues that makes necessary to determine and concrete the economic property regime in the case of mixed marriages and marital contracts are the ideal legal instrument to determine the economic regime in these cases.

The composition of the Catalan population is the result of the migration processes that took place in Spain during the second part of the 20<sup>th</sup> century. For example, in the year 2001; 25,9% of the national population living in Catalonia were born outside the catalan territory. In the cases of marriages between Spanish of different civil law the determination and the agreement upon the marital property is not easy, according to the inter-regional conflict of laws rules<sup>13</sup>.

At the same time, the foreing population in Catalonia has grown exponentially – from 1999 to 2002 it has increased on 53% and represents a 5,1% of the population living in Catalonia.

FOREIGN RESIDENTS IN CATALONIA / SPAIN										
	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
<b>CATALONIA</b>	72291	76244	83296	106809	114264	124550	148803	183736	214996	280167
<b>SPAIN</b>	393100	430422	461364	499773	538984	609813	719746	801329	895720	1.109.060

In both cases, either mixed marriages between Spanish or marriages between Catalans and non-nationals, there is an increasing need to make clear and determine the marital property regime, both for new marriages as well as for the already existing relationships.

These incentives are directly related to the following paragraph.

#### 4.6. Changes in the Composition of Family Property

Finally, marital contracts have developed due to the changes in the composition of family property, a favorable and a non-favorable treatment of the family revenues and the creation of a new market for judicial services.

The traditional usage of marital contracts in Catalonia was a consequence of the management and the inter-generational transmission of the rural property. The decrease of the weight of the

<sup>13</sup> See Albert LAMARCA I MARQUÈS, "Règim econòmic dels matrimonis catalans celebrats entre el 29.12.1978 i el 6.11.1990: Inconstitucionalitat de l'art. 9.2 CC en la redacció anterior a la llei 11/1990, de 15 d'octubre (Comentari a la STC 39/2002 de 14.2.2002)", *Revista Jurídica de Catalunya* 3/2002, 737.

agriculture in the Catalan economy has changed the exercise of self-determination. Moreover, in the last years there has been an important change in the composition of the family property and its management.

As a result, spouses once more have celebrated agreements on a notarial document, that are nothing else than marital contracts.

The family property of middle class economies used to be centered on the family residence. However, nowadays its structure has changed substantially through the purchase of other real state properties and the investments of family savings in the capital market. Moreover, limited liability partnerships have been deeply adopted in the organization of professionals involved in commercial activities.

Thus, the quantitative expansion of the owners' population that has taken place during the 20<sup>th</sup> century is due, in part, to a qualitative expansion in the real state ownership: middle-class families do not only own the family residence. This change in the structure of the family wealth has taken place together with the specialization of the market of juridical services and this has had an important influence in its management, in planning the taxation consequences of its intergenerational transmission and anticipating solutions to potential future conflicts. A clear example of this tendency is the so called *family protocol* within the management of family-owned companies' context<sup>14</sup>.

## 5. Conclusion and Future Perspectives

This paper analyzed the dynamics of the marital contracts in Catalonia and in Spain during the 20<sup>th</sup> century from the self-determination standpoint and presented several hypotheses that might explain the sudden recent changes in Catalonia.

From a positive analysis, we conclude that there is a structural relation between marital property and family self-determination. We believe that separate property requires the spouses to self-determine. This self-determination can be manifested in several ways and marital contracts are one of them. In contrast, the community property regime diminishes the self-determination scope up to the point that when self-determination is exercised, the result is to opt-out from the community property regime.

From a normative analysis, given the astonishing growth of marital contracts in Catalonia - with a rate per marriage of 12,12% in the year 2002 -, and in Spain - with a rate of 30,83% in the year 2001 -, the interesting challenge for family law scholars and for lawyers who practice in this field stems in determining the scope of the family self-determination through marital contracts.

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<sup>14</sup> See CUATRECASAS ABOGADOS, *Manual de la Empresa Familiar*, Cinco Días, Madrid, 2001.

Up to now the doctrine has basically dealt about the interpretation of the regulation of marital contracts, analyzing only the issues related to contracts, together with the traditional stipulations. These are the major underlying issues in the cases brought in front of the Catalan Supreme Court of Justice.

Besides the above-mentioned, for the law in Spain, additionally, has been important the analysis of the efficacy in front of third parties of the change in the marital property regime and the liquidation of the community property society foreseeing future creditors' frauds. The scarce Spanish case law concerning marital contracts deals mainly with the former questions.

However, the most important of professionals involved in family law still stems on defining the function and scope of marital contracts. This has a special significance considering the tendency towards the internationalization of the Spanish society and the conflict of laws inherent to this context.

As the data show, it seems that spouses have already taken the initiative.

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